In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 644

EXLEY EXPRESS, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. A) dismissing appellant's suit to set aside an order (J.S. App. B; p. 10) of the Interstate Commerce Commission. The basic issue is the validity of the Commission's partial grant of the application of Albany Food Products, Inc., an appellee, for motor-carrier "grandfather"

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authority under Section 7(c) of the Transportation Act of 1958 (72 Stat. 573) to transport frozen fruits, frozen berries, and frozen vegetables.[1]

On December 5, 1958, Albany Food Products, Inc., filed an application for "grandfather" authority to transport frozen fruits, berries, and vegetables between points in Oregon, Washington, and California. After full administrative proceedings, the Commission found that Albany Food Products, Inc. had established *bona fide* "grandfather" operations from, to, and between certain points, and authorized issuance of a certificate substantially more limited than that sought (J.S. App. B, p. 2). A petition for further consideration of the limited grant of authority was denied by the Commission on June 11, 1962.

On June 15, 1964, Albany Food Products asked the Commission for leave to file a petition for reconsideration. The stated ground was that, under the Court's decision in *Willis Shaw Frozen Express, Inc.* v. *United States,* 377 U.S. 159, the petitioner was entitled to broader authority. The Commission granted the petition and in its subsequent Report on Reconsideration concluded that, applying the standards established by *Shaw,* Albany Food Products was in fact entitled to broader authority than was previously granted (J.S. B, p. 6).

On appeal, the district court found that "the order of the Commission dated May 6, 1965, is supported by

[1] In *Frank P. Battaglia, et al.* v. *United States, et al.,* appeal pending, No. 564, O.T., 1966, a similar issue is presented, except that there, the motor carrier's application was partially denied.

substantial evidence and is not arbitrary or capricious" and "is hereby affirmed and this action dismissed" (J.S. App. A).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The legal standards of the "grandfather" clause of Section 7(c) were fully considered and determined by this Court in *Willis Shaw Frozen Express, Inc.* v. *United States*, *supra*. Like the *Battaglia* case (*supra*, fn. 1), in which the opposite result was reached on different facts, this appeal involves only the application of those standards to particular circumstances.[2]

The authority granted Albany Food Products by the Commission achieved substantial parity with its prior *bona fide* operations, and was properly sustained by the court below. Albany Food Products had conducted operations both prior to the "grandfather" date (May 1, 1958) and during the critical period in transporting frozen fruits, berries, and vegetables from, to, and between a substantial number of points in the territory covered by the Commission's grant. For example, it had served four Western Oregon points from eleven points in Washington; five Western Oregon points from ten points in California; three points in Western Washington from points in

[2] The *Shaw* decision and the Commission's actions thereunder are discussed in the motion to affirm filed by the United States and the Interstate Commerce Commission in *Battaglia* v. *United States*, No. 564, *supra*, at pages 4–5.

Oregon; and numerous points in California from points in Western Oregon (J.S. App. B, p. 7 and 8). "While the test of 'bona fide operation' within a specified 'territory' includes 'actual rather than potential or simulated service' (*McDonald* v. *Thompson*, 305 U.S. 263, 266), it does not necessarily restrict future operations to the precise points or areas already served" (*Alton R. Co.* v. *United States*, 315 U.S. 15, 21). The Commission's factual conclusion that Albany Food Products "handled the three commodities as a single class" and that its operations justified a broad, area-wide authority is supported by substantial evidence.

The precise scope of an individual carrier's "grandfather" rights, under Section 7(c)—a subject of continuing litigation,[8] always turns on the particular facts of the case. Here the correct standard was applied to the particular circumstances of this record. There is no occasion for further review.

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[8] Subsequent to this Court's decision in *Shaw*, six Section 7(c) cases have been filed in the district courts. In two such cases the Commission decision has been sustained (*Colonial Refrigerated Transportation, Inc.* v. *United States*, 255 F. Supp. 999 (N.D. Ala.), notice of appeal filed, and *Battaglia* v. *United States*, *supra*, n. 1); in one case the Commission decision was reversed (*Willis Shaw Frozen Express, Inc.* v. *United States*, 256 F. Supp. 257 (W.D. Ark.)); and three cases are still pending: *Lester C. Newton Trucking Co.* v. *United States*, Civil Action No. 2508, D. Del.; *Winter Garden Co.* v. *United States*, Civil Action No. 5457, E.D. Tenn.; and *W. W. Hughes* v. *United States*, Civil Action No. 41335, E.D. Pa.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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BRIEF OPPOSING MOTION TO AFFIRM

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BRIEF OPPOSING MOTION TO AFFIRM

Pursuant to Rule 16 (3) of the Rules of this Court, the appellant files this brief opposing the Motions to Affirm heretofore filed by the appellees.

All appellees, United States of America, Interstate Commerce Commission and applicant appellee, Albany Food Products, Inc., would put the Commission's decision in this case under the tent of *Willis Shaw Frozen Express, Inc. v. U. S.*, 377 U.S. 159, A per curiam opinion which reads in its entirety as follows (377 U.S. at 159-160):

> "Appellant applied to the Interstate Commerce Commission under the 'grandfather' clause of the Transportation Act of 1958, Sec. 7 (c), 72 Stat. 573, 49 U.S.C. Sec. 303 (b) (6), to transport as a common carrier over irregular routes frozen fruits, berries, and vegetables and frozen seafoods and poultry when transported with such frozen fruits, and vegetables. The Commission granted a certificate which substantially curtailed appellant's prior operations. 89 MCC 377. The District Court affirmed without opinion.
>
> "We think *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, requires reversal of the judgment and a remand to the Commission for reconsideration in light of appellant's status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of appellant to perform the services."

That decision in no way dictates the absurd result that has been achieved herein in that on the basis of the showing of extremely insubstantial, sporadic and inconsequential service Albany Food Products has been granted broad authority to serve virtually all points on the Pacific Coast, a far broader grant than this appellant received on the basis of a showing of several thousand shipments.

The appellant is willing to concede for the sake of argument that fruits, berries and vegetables be considered as a single class commodity but the appellant does insist and remind the court that the questions raised by this appeal direct themselves to a con-

sideration of the question of whether the Interstate Commerce Commission order dated May 6, 1965, is supported by substantial evidence and the question whether the Interstate Commerce Commission failed to apply the proper governing principles in deciding the question of the territory or points within that territory authorized to be served by the appellee applicant as a motor common carrier. Perhaps the most vivid example of lack of substantial evidence and obvious failure to properly apply the legal test can be pointed to by reference to the fact that the appellee applicant is authorized by the Commission order to serve all points in California to all points in the State of Washington west of U. S. Highway 97 while the evidence in the record before the Commission reflected only three shipments from California to Washington prior to the "grandfather" date. All of these originated in Los Angeles. After the "grandfather" date no origin point was served south of Watsonville. Thus, on shipments from California to Washington, the only origin point served before the "grandfather" date was not served thereafter nor were any in the same general area (a radius of 300 miles).

The record before the Interstate Commerce Commission in the instant case is void of any evidence shedding "light of appellant's status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agri-

cultural products, and the demonstrated ability of appellant to perform the services" as those terms are used and applied in the Shaw case.

Even more appropriate than the *Shaw* decision is that of the *Carolina* case referred to and relied upon in *Shaw*. It is to be noted that in *Carolina* the court approved the Commission's point-to-point grant of authority to the applicant as opposed to the area or territory-wide authority sought. As pointed out by Justice Douglas in the *Carolina* decision, the bona fide operations standard to measure the area or the specification of localities which may be serviced carry the connotation of substantiality. The case also makes clear that the holding out to serve a specified area is not alone sufficient. Citing *McDonald v. Thompson*, 305 U.S. 263, 266, the *Carolina* court emphasized the fact that it is actual rather than potential or simulated service which is required. The record herein considered by the Commission as well as the District Court did not concern itself with transportation characteristics and a marketing pattern of the products involved to begin to warrant the broad authority granted by the Commission and approved by the District Court or for that matter anything more than point-to-point service.

We submit that the Congressional mandate to the Commission as contained in Sec. 7 (e) of the Trans-

portation Act of 1958 cannot be interpreted as anything but a direction to the Commission to determine the extent to which a given applicant has been engaged in operations which were formerly exempt and which are now subject to regulation and to issue that applicant a certificate or permit commensurate with those operations in which the applicant was engaged prior to the "grandfather" date and in which it has continued to engage since that date.

As the Supreme Court held in *Alton R. Co. v. U.S.*, 315 U.S. 15, 62 S.Ct. 432, 'Grandfather' acts contemplate substantial parity between future operations and prior operations. See *Motor Convoy*, 2 MCC 197, 200; *Eastern Carriers v. U.S.*, 31 F. Sup. 232.

Appellant is ready to admit that it may be possible in a given case for there to be a pattern of points grouped in an area possessing some cohesion in an economic or transportation sense which would warrant an award of transportation authority to a particular area or territory and also that such areas could well coincide with governmental units. However, if the applicant's transportation operations do not indicate that such a pattern exists, the substantial parity as called for in the *Alton* case does not permit the transformation of an essentially point-to-point operation into a territorial or area grant of authority even under the *Shaw* decision. A consideration of the evidence